76-487

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-

GLENN MACK BELL,
Appellant,

v.

JOE S. HOPPER, WARDEN,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Appellant, Glenn Mack Bell, appeals from the judgment of the Supreme Court of Georgia entered in this proceeding on June 24, 1976, and from the order denying the motion for rehearing entered on July 8, 1976, and respectfully submits this statement to show that this Court has jurisdiction of the appeal and that the questions presented are substantial.

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 237 Ga. 189, 237 S.E.2d 41, and appears as Appendix A, infra, at p. A1. The opinion of the Superior Court of Tattnall County is unreported, and appears as Appendix B, infra, at p. A5.

JURISDICTION

This Court's jurisdiction is invoked under Title 28 U.S.C. §1257(2). The judgment of the Supreme Court of Georgia remanding the case with direction was entered June 24, 1976, and appears as Appendix C, infra, at p. A10. The Order denying Appellant's motion for rehearing was entered on July 8, 1976, and appears as Appendix D, infra, at p. A11. A notice of appeal was filed in the Supreme Court of Georgia on July 9, 1976, and appears as Appendix E, infra, at p. A12. This jurisdictional statement was filed within 90 days of July 8, 1976.

The majority opinion stated:

> "When a prisoner in a habeas corpus proceeding shows that he was unconditionally discharged from prison after receiving a sentence for armed robbery, was arrested upon a warrant charging him with that armed robbery without hearing, the burden in a habeas corpus proceeding shifts to the warden to show that the subsequent restraint is legal.

> "This case therefore is remanded to the habeas court to enable the warden to produce evidence that petitioner's sentence has not been commuted or otherwise expired, that petitioner has not been paroled or pardoned, and that petitioner's current imprisonment is legal." Ga. at 191.

Appellant filed a motion for rehearing as appears in Appendix F, infra, at p. A13, raising the issue that the remand statute, Ga. Code Ann. §6-1610, was invalid, as applied, by reason of repugnancy to, and violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Ga. Code Ann. §6-1610 provides:

> "The decision in each case shall be entered on the minutes, and it shall be within the power of the appellate court to award such order and direction to the cause in the court below as may be consistent with the law and justice of the case."

Ga. Code Ann. §6-1610, as applied, affords the State a second opportunity to refute Appellant's proof adduced on the first trial that his restraint is illegal; the statute, as applied, violates the Due Process Clause by authorizing remand of this cause for the reason that the State failed to carry its burden on the first trial.

Further, there is no showing in the record that the State possesses any evidence with which it might carry its burden on a second trial; thus the application of Ga. Code Ann. §6-1610 is without record support and so infracts the Due Process Clause.

The judgment of the Supreme Court of Georgia entered June 28, 1976, and the order denying the motion for rehearing entered July 8, 1976, constitute a final judgment as to the federal issues within the meaning of 28 U.S.C. §1257.

Under Ga. Code Ann. §6-1610, as applied, where an appellant establishes that his incarceration is illegal, and the State adduces no evidence to prove legality of confinement, the cause is remanded for a second trial for the purpose of giving the State another opportunity to prove that Appellant's confinement is legal. The present case is a variant of the third category identified in Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 481, 95 S.Ct. 1029, 43 L.Ed. 2d 328 (1975): the federal issues will be mooted whether Appellant prevails or loses on the merits; the federal issues will survive only if the cause reaches the Supreme Court of Georgia again and that Court renders opinion and judgment similar to that rendered here.

While Ga. Code Ann. §6-1610 is a procedural statute, its application serves as a means to deny Appellant

his Due Process right to a finding that the State has failed to prove legality of confinement and his right to the resulting judgment ordering his release.

In the event this Court determines that this cause is not within its appellate jurisdiction, Glenn Mack Bell respectfully prays that the Court treat these papers as a petition for certiorari under 28 U.S.C. §1257(3), and that a writ of certiorari issue to review the judgment and opinion entered in this proceeding on June 28, 1976, and the order denying the motion for rehearing entered on July 8, 1976.

QUESTIONS PRESENTED

1. Is Due Process infracted in a habeas proceeding where a petitioner establishes that he was unconditionally discharged from prison after receiving a sentence for armed robbery, was arrested upon a new bench warrant charging him with that armed robbery, and without being granted a hearing was incarcerated in the prison from which he was unconditionally discharged while serving the sentence for that armed robbery thus shifting the burden to the State which adduces no evidence to prove legality of confinement, and the habeas court remands the petitioner to custody.

2. Is Due Process infracted in a habeas cause where an appellant has shifted the burden to the State to prove legality of confinement, the State has adduced no evidence to carry the shifted burden although having full opportunity to do so, and the Supreme Court of Georgia renders judgment remanding the cause for a second trial for the purpose of giving the State another opportunity to prove that Appellant's confinement is legal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellant's constitutional claims are grounded primarily upon the right to Due Process guaranteed by the Fourteenth Amendment §1 to the United States Constitution which provides in pertinent part:

> [N]or shall any State deprive any person of the State or property, without due process of law***.

The Statutory provision involved is Ga. Code Ann. §6-1610 set out under "Jurisdiction" at p. 3.

STATEMENT OF THE CASE

Appellant was indicted, tried and convicted of armed robbery in case no 8-12778 in the Superior Court of Clayton County, Georgia; he was sentenced to life imprisonment on March 28, 1974 (Res. Exhibit 2, Tr. 73), and appealed to the Supreme Court of Georgia which affirmed his conviction in Bell v. State, 234 Ga. 473, 216 S.E.2d 279 (1975). Appellant timely filed in this Court a petition for writ of certiorari, Bell v. Georgia, case no. 75-5334, to review the judgment and opinion of the Supreme Court of Georgia.

Cecil M. McCall, Chairman of the State Board of Pardon and Paroles, by letter dated September 3, 1975, to Appellant's mother, stated that Appellant would be discharged from prison on September 9, 1975 (Pet. Exhibit 9, Tr. 70). Appellant was discharged from Reidsville State Prison on September 9,1975 (Tr.35). He was unconditionally discharged while serving a life sentence (Stipulation, Tr. 22).

Appellant returned to Clayton County where he resided with his parents at their home in Forest Park, Georgia (Tr. 34). After conferring with counsel, and in reliance upon his unconditional discharge (Tr. 45), Appellant moved this Court to dismiss his petition for certiorari under Rule 60 by motion mailed to the Clerk of this Court on October 17,1975, and received on October 20, 1975. Certiorari was dismissed on November 5, 1975. Bell v. Georgia, 423 U.S. 940,___ S.Ct. ___ , 46 L.Ed.2d 273.

On October 21, 1975, a bench warrant was issued by the Superior Court of Clayton County under the same case number, 8-12778, as the indictment under which the Appellant was serving life sentence at that time of his unconditional discharge (Pet. Exhibit 10, Tr. 71; Res. Exhibit 2, Tr.73). The bench warrant recited that:

> "Whereas, at February Term, 1974, of the Superior Court of the County aforesaid, the Grand Jurors did find a true bill against Glenn Mack Bell for the offense of Armed Robbery.
>
> You and each of you are therefore commanded in the name of the State to apprehend the said Defendant, . . . , to commit him to the common jail of said county, to be dealt with as the law directs." (Pet. Exhibit 10, Tr.71; Res. Exhibit 1, Tr.72).

Appellant was arrested on October 22, 1975, by Clayton County law enforcement officers upon the bench warrant,confined in the Clayton County jail for two days, and without being granted a hearing was transported to the Reidsville State Prison and confined (Tr.35-36), all without judicial order or judgment (Pet. Exhibit 1, Tr.65).

Appellant remains confined in Reidsville under authority of an assignment/ transfer order issued by the Department of Offender Rehabilitation (also known as the Department of Corrections) dated October 24, 1976 (Pet. Exhibit 6, Tr.67).

Appellant filed a petition for habeas corpus. At the evidentiary hearing on December 17, 1975, the State successfully sought to deny enforcement ,of Appellant's subpoena on Aubrey Walker, an official of the State Board of Corrections, invoking Ga. Code Ann. §38-801(e) which limits the subpoena range to 150 miles from the place of hearing (Tr.6-9); §38-801(e) has been held applicable in a habeas proceedings. Jones v.Caldwell, 230 Ga. 775, 199 S.E.2d 249 (1973). After the burden shifted to the State to prove legality of confinement, Bell v. Hopper, Ga. at 191, the State adduced no evidence to prove that Appellant's restraint was legal; the State adduced no evidence of any supposed error or supposed mistake and made no claim of error or mistake.

The habeas court entered an order on January 29, 1976, remanding Appellant to custody. On appeal before the Supreme Court of Georgia, Appellant enumerated as errors, numbered 1 through 7, respectively, the following findings of fact in the order of the habeas court (Appendix B, infra, p.7-8) on the grounds that each was without evidence to support it: that ". . . the evidence clearly establishes that Petitioner's life sentence has not expired . . ."; that " . . . the evidence clearly established . . . that the sentence has not been commuted . . . "; that " . . . that evidence clearly establishes . . . that the Petitioner has not been paroled or pardoned."; " . . . that any statements of assertions made to Petitioner

or his family by State officials concerning his release date were made without knowledge of his 1974 sentence."; " . . . that Petitioner's discharge from the Georgia State Prison on September 9, 1975 was erroneous."; that Petitioner's rearrest by Clayton County officials on October 22, 1975 was lawful; that Petitioner was lawfully restrained (Appellant's Brief in the Supreme Court of Georgia, p. 4-5). Appellant invoked the protection of the 14th Amendment §1 (Id. p.11):

> "Each of the findings of facts complained of in Enumerations Nos. 1-7, and the final Order and Judgment was not based on evidence, but was based solely on speculation and conjecture. There was no evidence of mistake or error and no claim of mistake or error was made. The findings of fact and the final Order and Judgment were based on no evidence, and thus infract the due process clause of the 14th Amendment to the United States Constitution."

The Supreme Court of Georgia remanded the case to enable the warden to produce evidence, Bell v. Hopper, Ga. at 191, as quoted,supra, at p. 2-3. Appellant invoked the protection of the Due Process Clause in his motion for rehearing as against the application of the remand statute, Ga. Code Ann. §6-1610, as set out under "Jurisdiction" supra, at p. 2-5. Appellant's motion for rehearing was denied on July 8, 1976, without opinion.

THE QUESTIONS ARE SUBSTANTIAL

1. DUE PROCESS IS INFRACTED IN A HABEAS PROCEEDING WHERE THE BURDEN IS SHIFTED TO THE STATE WHICH ADDUCES NO EVIDENCE TO CARRY THE SHIFTED BURDEN AND PETITIONER IS REMANDED TO CUSTODY.

The quotation from the majority opinion, Ga. at 191, set out infra, at p. 2-3, signals the grave character of this case. Appellant shifted the burden to the State which adduced no evidence to prove legality of confinement and the habeas court remanded Appellant to custody. The order and judgment of the habeas court, Appendix B, infra, p. 5-9, was based on no evidence, but rather on speculation and conjecture, thus violating the Due Process Clause. Gregory v. Chicago, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969); Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961); Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960). The Supreme Court of Georgia remanded the cause thus denying Appellant's Due Process entitlement to immediate relief on this record.

In Faye v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed2d 837 (1963), the Court said:

> "Vindication of due process is precisely the [Great Writ's] historic office. 'In 1593, for example, a bill was introduced in the House of Commons, which, after deploring the frequency of violations of 'the great Charter and auncient good Lawes and statutes of this realme', provided:

'Fore remedy whereof be it enacted: That the provisions and prohibicions of the said great Charter and other Lawes in that behalfe made be dulie and inviolatelie observed. And that no person or persons be hereafter committed to prison but yt be by sufficient warrant and Authorities and by due course and proceedings in Lawe * * *.

'And that the Justice of anie the Queenes Majesties Courts of Recorde at the common Lawe maie awarde a writt of habeas corpus for the deliverye of anye person so imprisoned * * * .

Although it was not enacted, this bill accurately prefigured the union of the right to due process drawn from Magna Charta and the remedy of habeas corpus accomplished in the next century."
Id., U.S. at 402.

The device used to incarcerate the Appellant was a bench warrant. Ga.Code Ann.§27-801 provides in pertinent part:

> "A bench warrant is one issued by a judge for the arrest of one accused of a crime by a grand jury."

Both dissenting opinions state that the bench warrant used here was void, Bell v. Hopper, Ga. at 191-192, and the majority opinion implies that the warrant was void, Ga. at 191.

In Faye v. Noia, supra, U.S. at 401,

the Court said:

> "Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."

Here, Appellant was arrested under a void bench warrant issued by the judicial branch of government, imprisoned under an assignment/transfer order issued by the executive branch, and denied relief by the judiciary of Georgia.

2. DUE PROCESS IS INFRACTED WHERE THE SUPREME COURT OF GEORGIA REMANDS A HABEAS CAUSE FOR A SECOND TRIAL FOR THE PURPOSE OF GIVING THE STATE ANOTHER OPPORTUNITY TO PROVE THAT THE APPELLANT'S CONFINEMENT IS LEGAL.

In a dissenting opinion, Ingram J. joined by Hall J. said;

> "In our judgment the state failed at the habeas hearing to show that appellant's present restraint is legal and therefore a writ of appellant's release should have been issued by the habeas judge. The majority opinion concedes this to be the case by remanding "to the habeas court to enable the warden to produce evidence that petitioner's sentence has not been commuted or otherwise expired, that [appellant] has not been paroled or pardoned, and that [appellant's] current imprisonment is legal.
>
> "This was exactly what the state should have done at the habeas hearing but failed to do. In other words, the majority opinion in effect holds that although the state failed to show appellant's restraint was legal, a second habeas hearing will be conducted to give the state another opportunity to refute appellant's proof at the first hearing that his present restraint is illegal. The majority opinion cites no authority for its holding and I know of no authority which allows a second trial simply because the state failed to prove its case at the first trial." Bell v. Hopper, Ga. at 192.

There is no fair support for the instant application of Code §6-1610 in Georgia law; further, there is no support whatever for this application of Code

§6-1610 in Georgia law. See generally, Annotation to Ga. Code Ann. §6-1610; 2 E.G.L. Appeals §192. Further, Appellant is unable to find authority for the holding of the majority in any jurisdiction.

Consistent with the reasoning of the decision, the State may obtain a new hearing after each instance of its failure to prove legality of confinement, affording the State a succesion of new hearings; under the reasoning of the decision, a logic loop exists which terminates upon a prisoner's declination to prosecute yet another barren appeal.

Under the circumstances here, the State deliberately by passed its remedy. In Faye v. Noia, supra, U.S. at 439, the Court said:

> "But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458,464, 58 S.Ct. 1019, 82 L.Ed.1461 - "an intentional relinquishment or abandonment of a known right or privilege" - furnishes the controlling standard. If a habeas applicant after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the

federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits - though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default." Id. U.S. at 439.

The State did not contend before the habeas court the Appellant's discharge was erroneous but raised its theory of mistake or error, without record support, for the first time before the Supreme Court of Georgia. On the hearing before the habeas court, the State had full opportunity to adduce evidence on the theory of mistake and not only failed to do so, but deliberately prevented Appellant from enforcing his subpoena served on Aubrey Walker, an official of the Department of Offender Rehabilitation, by invoking Ga. Code Ann. §38-801(e). The deliberate by-passing by the State of its remedy of seeking to prove its case on the first trial has gained for the State the strategic advantage of continued incarceration of Appellant and a second trial for reasons unsupported by the record.

By analogy to the deliberate by-pass rule of Faye v. Noia, the State has waived its right to a new trial, and the Supreme Court of Georgia denied Appellant Due Process by granting the State a new trial instead of rendering judgment granting Appellant immediate relief on the merits.

CONCLUSION

Justice Gunter in his dissent stated, "I think the court by its decision today in this case has judicially created a dwarf out of what was once the 'Great Writ'." Appellant respectfully urges that the questions presented by this appeal are critical to the future of the writ of habeas corpus in Georgia, and they are so substantial as to require plenary consideration by this Court. Appellant asks that jurisdiction be noted.

Respectfully submitted,

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APPENDIX A

31174. BELL v. HOPPER.

HILL, Justice.

This is a habeas corpus case in which we granted a certificate of probable cause to appeal. Our primary concern was and is that the judicial branch of government is without authority to countermand lawful orders of the executive branch pardoning or paroling a prisoner or commuting his sentence. Also of concern was the absence of a full evidentiary hearing. For the reasons stated hereinafter, we remand for further proceedings.

Petitioner was indicted in 1974 by the February term grand jury of Clayton County for armed robbery, was tried in case number 8-12778, was convicted, and was sentenced to life imprisonment on March 28, 1974, which conviction was affirmed on appeal in *Bell v. State*, 234 Ga. 473 (216 SE2d 279) (1975).

On July 28, 1975, the Department of Corrections, by letter from the office of the commissioner to petitioner, stated that petitioner would be discharged on September 9, 1975.

On September 3, 1975, the State Board of Pardons and Paroles, by letter of its chairman to petitioner's mother, stated that petitioner would be discharged from prison on September 9, 1975.

Petitioner was released from Reidsville State Prison on September 9, 1975. He returned to Clayton County.

On October 21, 1975, a bench warrant was issued by the Superior Court of Clayton County for the arrest of petitioner based upon the 1974 grand jury indictment for armed robbery in case number 8-12778. Petitioner was rearrested the following day and was returned to Reidsville.

Petitioner sought habeas corpus relief. The warden stipulated that when petitioner was released from Reidsville on September 9, 1975, he was "unconditionally discharged." The habeas court remanded the petitioner to the custody of the warden after finding that petitioner's discharge after serving only 18 months on a life sentence was erroneous. The habeas court found further as follows:

"While it is not possible, based upon the evidence before this Court, to determine precisely why Petitioner was released from prison after serving less than two years of a life sentence, the evidence clearly establishes that Petitioner's life sentence has not expired, that the sentence has not been commuted, and that Petitioner has not been paroled or pardoned. In this habeas corpus proceeding Petitioner bears the burden of showing that his current restraint is illegal or otherwise invalid. The evidence before this Court shows, at most, that officials of the Department of Offender Rehabilitation and the Board of Pardons and Paroles were under the impression that Petitioner was to be released from prison in September 1975. This Court finds it incredible that these officials would have been under this impression had they been aware of Petitioner's 1974 conviction and life sentence. Accordingly, this Court finds that any statements or assertions made to Petitioner or his family by State officials concerning his release date of September 9, 1975, were made without knowledge of the 1974 life sentence."

We share the habeas court's perplexity. Unfortunately, we are unable to agree with the findings and conclusions such perplexity arouses.

When a prisoner in a habeas corpus proceeding shows that he was unconditionally discharged from prison after receiving a sentence for armed robbery, was rearrested upon a warrant charging him with that armed robbery, and was reimprisoned for that armed robbery without a hearing, the burden in a habeas corpus proceeding shifts to the warden to show that the subsequent restraint is legal.

This case therefore is remanded to the habeas court to enable the warden to produce evidence that petitioner's sentence has not been commuted or otherwise expired, that petition has not been paroled or pardoned, and that petitioner's current imprisonment is legal.

Remanded with direction. All the Justices concur, except Gunter, Ingram and Hall, JJ., who dissent.

ARGUED JUNE 14, 1976 — DECIDED JUNE 24, 1976 — REHEARING DENIED JULY 8, 1976.

Habeas corpus. Tattnall Superior Court. Before Judge Harvey.

Paul S. Weiner, Paul McGee, for appellant.

John W. Underwood, District Attorney, Arthur K. Bolton, Attorney General, G. Stephen Parker, Assistant Attorney General, for appellee.

GUNTER, Justice, dissenting.

I think the court by its decision today in this case has judicially created a dwarf out of what was once the "Great Writ." I would reverse the habeas corpus judgment rendered below.

This record and the court's opinion show that the appellant was arrested under a void warrant; he was not afforded a commitment hearing or any other kind of hearing by the state; immediately after his unconstitutional arrest, he was transported from his home county to a distant state correctional institution; and he has been unconstitutionally incarcerated there since October of 1975, some nine months.

If there ever was or ever will be a record and transcript that depicts the deprivation of the liberty of a citizen without due process of law more vividly than this one does, it would exceed the confines of my rather uninhibited imagination.

I think the appellant has, since October 22, 1975, been deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution and its equivalent in the Georgia Constitution.

I respectfully dissent.

INGRAM, Justice and HALL, Justice, dissenting.

In our judgment the state failed at the habeas hearing to show that appellant's present restraint is legal and therefore a writ of appellant's release should have been issued by the habeas judge. The majority opinion concedes this to be the case by remanding "to the habeas court to enable the warden to produce evidence that

petitioner's sentence has not been commuted or otherwise expired, that [appellant] has not been paroled or pardoned, and that [appellant's] current imprisonment is legal."

This was exactly what the state should have done at the habeas hearing but failed to do. In other words, the majority opinion in effect holds that although the state failed to show appellant's restraint was legal, a second habeas hearing will be conducted to give the state another opportunity to refute appellant's proof at the first hearing that his present restraint is illegal. The majority opinion cites no authority for its holding and I know of no authority which allows a second trial simply because the state failed to prove its case at the first trial.

Appellant established at the habeas hearing that he received a life imprisonment sentence for robbery in Clayton Superior Court; that after he had served a part of the sentence at the Reidsville penitentiary he was unconditionally discharged by state authorities and released from prison. Thereafter, while living at home in Clayton County, he was re-arrested on a new bench warrant based on the original robbery indictment and taken back under that bench warrant to prison at Reidsville without any notice or hearing of any kind.

In our opinion, the bench warrant under which appellant was taken back to the Reidsville penitentiary was void. See Code Ann. § 27-801 for the function and purpose of a bench warrant. We do not question the power of the state to recommit a prisoner who is released or discharged by mistake. No mistake was shown by the state at the habeas hearing. If appellant's unconditional discharge was a mistake, appropriate proceedings can be initiated by the state to correct that mistake and re-commit appellant to custody. The re-arrest and reconfinement of appellant under a void bench warrant without a hearing is not the way to do it.

APPENDIX B

ORDER

Petitioner Glenn Mack Bell, an inmate at the Georgia State Prison, filed a petition for writ of habeas corpus in this Court, alleging that his current confinement by the Respondent-Warden was illegal. Petitioner contends that his release from the Georgia State Prison in September 1975 terminated the life sentence imposed upon him in 1974. This Court directed the Respondent to produce Petitioner for an evidentiary hearing on December 17, 1975.

Based upon the testimony and documentary evidence introduced at the evidentiary hearing, this Court makes the following findings of fact and reaches the following conclusions of law:

Following a jury trial Petitioner was convicted in the Superior Court of Clayton County of armed robbery and sentenced to life imprisonment on March 28, 1974. Prior convictions for burglary were alleged in the Clayton County indictment, and the Respondent's records reflect that Petitioner had previously been incarcerated in the Georgia prison system for burglary and armed robbery convictions. Petitioner's 1974 Clayton County conviction and sentence were upheld by the Supreme Court on direct appeal. Bell v. State, 234 Ga. 473 (1975).

In July 1975 Petitioner received a letter while incarcerated at the

Georgia State Prison from an official of the Department of Offender Rehabilitation concerning Petitioner's request for a transfer. The letter indicated that Petitioner's discharge date was September 9, 1975. Subsequently, Petitioner's mother received a letter from the office of the Chairman of the Board of Pardons and Paroles stating that Petitioner was to be discharged from prison on September 9, 1975. Petitioner was discharged from the Georgia State Prison on September 9, 1975, approximately 18 months after having received a life sentence for armed robbery in the Superior Court of Clayton County. Following his discharge Petitioner returned to his parents' home in Forest Park, Georgia.

On or about October 22, 1975, Petitioner was arrested by Clayton County authorities pursuant to a bench warrant issued by Judge Harold Banke of the Clayton Judicial Circuit. The bench warrant was based upon indictment number 8-12778, on which Petitioner had been convicted and sentenced to life imprisonment in March 1974. Following his arrest in Clayton County, Petitioner was transferred back to the Georgia State Prison on October 24, 1975.

This Court finds that Petitioner's discharge from the Georgia State Prison on September 9, 1975 was erroneous. While it is not possible, based upon the evidence before this Court, to determine precisely why Petitioner was released from prison after serving

less than two years of a life sentence, the evidence clearly establishes that Petitioner's life sentence has not expired, that the sentence has not been commuted, and that Petitioner has not been paroled or pardoned. In this habeas corpus proceeding Petitioner bears the burden of showing that his current restraint is illegal or otherwise invalid. The evidence before this Court shows, at most, that officials of the Department of Offender Rehabilitation and the Board of Pardons and Paroles were under the impression that Petitioner was to be released from prison in September 1975. This Court finds it incredible that these officials would have been under this impression had they been aware of Petitioner's 1974 conviction and life sentence. Accordingly, this Court finds that any statements or assertions made to Petitioner or his family by State officials concerning his release date of September 9, 1975 were made without knowledge of the 1974 life sentence.

Based upon these findings, this Court concludes that Petitioner's release from the Georgia State Prison on September 9, 1975 did not affect the validity of his life sentence imposed in 1974. Any categorization of Petitioner's release as "unconditional" was without legal significance, in view of the total absence of any official action to commute or otherwise terminate Petitioner's life sentence. The letter to Petitioner's mother from the Board of Pardons and

Paroles reflected no action on Petitioner's sentence by that body and had no legal effect on Petitioner's life sentence.

Petitioner's contention that he was arrested illegally on an invalid warrant does not, under the circumstances of this case, state grounds for habeas corpus relief. Generally, an illegal arrest does not render subsequent confinement under a lawful conviction invalid, as any defect is cured or rendered harmless by the subsequent conviction. See e.g., Frye v. Caldwell, 229 Ga. 9 (1972); Griffin v. Smith, 228 Ga. 177 (6) (1971). In Petitioner's case the allegedly illegal arrest occurred after indictment and conviction, unlike the situation in the cases cited. It cannot be seriously disputed, however, that one who is erroneously released from prison may be subsequently rearrested before expiration of the term of his sentence. White v. Pearlman, 42 F. 2d 788, 789 (10th Cir. 1930). [1] Petitioner's rearrest by Clayton County authorities on October 22, 1975 was therefore lawful, notwithstanding any alleged deficiencies in the bench warrant.

In accordance with the findings of fact and conclusions of law contained in this order, it is hereby ORDERED and ADJUDGED that Petitioner Glenn Mack Bell be remanded to the custody of the Respondent for completion of service of the sentence under which he is presently held,

costs of this action to be taxed against the Petitioner.

This 28th day of January, 1976.

/S/ John R. Harvey
JOHN R. HARVEY, JUDGE
Superior Courts
Atlantic Judicial Circuit

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[1] The White court held that an inmate who is erroneously released through no fault of his own is entitled to credit on his sentence for the time spent at liberty. The evidence before this Court reflects that Petitioner is receiving credit, for purposes of parole consideration, for the time between his erroneous release and his subsequent reincarceration.

APPENDIX C

31174

SUPREME COURT OF GEORGIA

Atlanta, June 24, 1976

The Honorable Supreme Court met pursuant to adjournment.
The following was rendered:

Glenn Mack Bell v.
Joe S. Hopper, Warden

This case came before this court upon an appeal from the Superior Court of Tattnall County; and, after argument had, it is considered and adjudged that the judgment of the court below be remanded with direction. All the Justices concur, except Gunter, Ingram and Hall, JJ, who dissent.

APPENDIX D

31174

SUPREME COURT OF GEORGIA

Atlanta, July 8, 1976

The Honorable Supreme Court met pursuant to adjournment.
The following order was passed:

Glenn Mack Bell v.
Joe S. Hopper, Warden

Upon consideration of the motion for rehearing filed in this case, it is ordered that it be hereby denied.

APPENDIX E

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

TO: Mrs. Joline B. Williams
Clerk, Supreme Court of Georgia

NOTICE is hereby given that Glenn Mack Bell, Appellant in the above-captioned cause, hereby appeals to the Supreme Court of the United States from the judgment of the Supreme Court of Georgia entered June 24, 1976, which judgment, as appears from the inscription in the judgment book, is that the case is remanded with direction; and from the judgment denying Appellant's Motion for Rehearing entered July 8, 1976. Said judgments of June 24, 1976 and July 8, 1976 finally determined the federal issues for purposes of state litigation, and a reversal of said judgments would be preclusive of further litigation. Said judgments are final as contemplated by Cox Broadcasting Corporation v. Cohn, 95 SCt 1029,1040 (1975).

This appeal is taken pursuant to 28 USC §1257(2).

This the 9th day of July, 1976.

/S/ Paul S. Weiner by
Paul McGee by express
authority
PAUL S. WEINER
Attorney for Appellant
Glenn Mack Bell

Paul McGee /S/
Paul McGee
Of Counsel for Appellant
Glenn Mack Bell

APPENDIX F

MOTION FOR REHEARING

COMES NOW, Glenn Mack Bell, Appellant in the above-captioned case, within the time allowed by law, and within 10 days as determined by the rules of this Court from June 24, 1976, the date of rendition of the decision of the Court, and makes and files this his Motion for Rehearing, and with utter respect shows the Court the following:

The majority remand the case"...to the habeas court to enable the warden to produce evidence that petitioner's sentence has not been commuted or otherwise expired, that petitioner has not been paroled or pardoned, and that petitioner's current imprisonment is legal." Opinion, 3.

Code §6-1610 provides:

> "The decision in each case shall be entered on the minutes, and it shall be within the power of the appellate court to award such order and direction to the cause in the court below as may be consistent with the law and justice of the case."

Code §6-1610 is invalid, as applied, by reason of repunancy [sic] to, and violation of, the Fourteenth Amendment §1 to the Constitution of the United States.

Code §6-1610, as applied, affords the State a second opportunity to refute petitioner's proof adduced on the first hearing that his restraint was illegal. Code §6-1610,

as applied, violates the Due Process Clause by authorizing the remand of this case for a new hearing merely because the State failed to carry its burden on the first hearing.

Under Code §6-1610, as applied, where a petitioner proves that his incarceration is illegal, and the State adduces insufficient evidence to prove legality of confinement, the case is remanded for a new hearing to enable the State to adduce evidence that the petitioner's confinement is legal. Consistent with the foregoing, the State may obtain a new hearing after each instance of its failure to prove legality of confinement thus affording the State a succession of new hearings. Thus Code §6-1610, as applied, creates a logic loop which ends upon a petitioner's declination to prosecute yet another barren appeal.

There is no fair support for this application of Code §6-1610 in Georgia law; further, there is no support whatever for this application of Code §6-1610 in Georgia law. See generally, Annotation to Ga. Code Ann. §6-1610; 2 E.G.L. Appeals §192. Further, petitioner is unable to find support for the holding of the majority in any jurisdiction.

The principle complaint leveled at the habeas court was that each of the findings of fact enumerated as error in Nos. 1-7, and the Final Order and Judgment was not based on evidence, but was based solely on speculation

and conjecture; that there was no evidence of any supposed mistake or error, and no claim of mistake or error was made; that the findings of fact and the Final Order and Judgment were based on no evidence thus infracting the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The judgment of this Court can be viewed in a similar manner: there is no evidence in the record that the State possesses the evidence supposed by the majority opinion. Thus, Code §6-1610, as applied, authorizes the remand of this case for a reason which is unsupported by the record. The judgment of the Court is based on no evidence and thus infracts the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The application of Code §6-1610 constitutes a denial of equal protection of law in that it denies to petitioner the rights incident to Habeas Corpus which are afforded to other petitioners for the Great Writ.

CONCLUSION

For each of the foregoing reasons, it is most respectfully requested that the Court grant a rehearing, and render decision and judgment reversing the final Order of the Supreme Court of Tattnall [sic] County; and

direct that Appellant be released instanter.

Respectfully submitted,

/S Paul S. Weiner by
Paul McGee
PAUL S. WEINER
Attorney for Appellant
GLENN MACK BELL

/S/ Paul McGee
PAUL McGEE
Of Counsel for Appellant
GLENN MACK BELL

CERTIFICATE OF COUNSEL

I, Paul McGee, Counsel for Movant herein, hereby certify that upon careful examination of the opinion of the Court, I believe that the Court has overlooked the application of the Fourteenth Amendment §1 to the Constitution of the United States in the holding of the case; in remanding the case with the direction given in the opinion; and in missapplying Code §6-1610.

This the 6th day of July, 1976.

Respectfully submitted,

/S/ Paul McGee
PAUL McGEE
Of Counsel for Appellant
GLENN MACK BELL

IN THE

Supreme Court of The United States

OCTOBER TERM, 1976

No. 76-487

GLENN MACK BELL,
Appellant,

v.

JOE S. HOPPER, WARDEN,
GEORGIA STATE PRISON,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS

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TABLE OF AUTHORITIES

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STATUTES CITED:

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28 U.S.C. § 2254

28 U.S.C. § 1257

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-487

GLENN MACK BELL,

Appellant,

v.

JOE S. HOPPER, WARDEN,
GEORGIA STATE PRISON,

Appellee.

ON APPEAL FROM THE SUPREME
COURT OF GEORGIA

MOTION TO DISMISS

The appellee, through the Attorney General of the State of Georgia, moves to dismiss the above-styled appeal on the grounds that: (1) The decision of which Appellant seeks review in this Court is not a final judgment or decree within the meaning of 28 U.S.C. § 1257 because of the pendency of further proceedings in the Georgia courts; (2) The State statute purportedly drawn into question and upheld by the Georgia Supreme Court was not challenged in a timely manner by Appellant and (3) Appellant has not exhausted his available State remedies pursuant to 28 U.S.C. § 2254 in this habeas corpus proceeding.

STATEMENT OF THE CASE

Appellant seeks to have this Court review the decision of the Georgia Supreme Court in Bell v. Hopper, 237 Ga. 189, 227 S.E.2d 41 (1976). Appendix A. In that decision the Georgia Supreme Court remanded Appellant's habeas corpus case to the Superior Court of Tattnall County, Georgia, for a second evidentiary hearing on the circumstances surrounding Appellant's release from the Georgia prison system in September 1975, following service of approximately 18 months of a life sentence for armed robbery imposed in the Superior Court of Clayton County, Georgia on March 28, 1974. Appellant's conviction and sentence had been upheld on direct appeal. Bell v. State, 234 Ga. 473, 216 S.E.2d 279 (1975).

Appellant filed his petition for habeas corpus in the Tattnall Superior Court, pursuant to Ga..Code Ann. § 50-127 (3), and appeared in that court for an evidentiary hearing on December 17, 1975. Evidence adduced at that hearing reflected that Appellant had been discharged from the Georgia State Prison on September 9, 1975, and had been taken back into custody on October 22, 1975. Appendix B, p. A6. The habeas corpus court found no evidence to show that Appellant's life sentence had been commuted or otherwise terminated or that Appellant had been pardon or paroled. Appendix B, p. A7. In the absence of any such evidence, the court

found that Appellant's release from custody in September 1975 was erroneous. The court concluded that Appellant's subsequent arrest in October 1975 was lawful and that Appellant was properly in the custody of the Respondent-Appellee pursuant to the 1974 life sentence. Appendix B, p. A8.

In vacating the judgment of the habeas corpus court, the Georgia Supreme Court's majority opinion expressed disagreement with the findings and conclusions of the habeas corpus court, and remanded the case to the superior court for further evidentiary proceedings. Appendix A, p. A2. The majority opinion contained no discussion of the merits of Appellant's contention that he had been denied Due Process by his arrest and reincarceration following his release.

Appellant then filed a Motion for Rehearing in the Georgia Supreme Court, challenging for the first time the constitutionality of Ga. Code Ann. § 6-1610, on the ground that its application to him denied him due process. Appendix F. The statute challenged by Appellant provides for entry of the Supreme Court's decisions on the minutes of the court, and gives the court the authority to "award such order and direction to the cause in the court below as may be consistent with the law and justice of the case." Ga. Code Ann. § 6-1610. The Supreme Court summarily denied the Motion for Rehearing without

opinion. Appendix D. Appellant then filed his Notice of Appeal to this Court. Appendix E.

ARGUMENT

1. THIS CASE IS NOT WITHIN THE JURISDICTION OF THE SUPREME COURT BECAUSE THE STATE COURT DECISION WAS NOT A FINAL JUDGMENT OR DECREE WITHIN THE MEANING OF 28 U.S.C. § 1257.

A fundamental limitation on this Court's jurisdiction to review a decision by the highest court of a State is contained in the first words of 28 U.S.C. § 1257, which provides for certain types of review of "[f]inal judgments or decrees rendered by the highest court of a State." Appellant attempts to rely upon Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) to support his argument that the Georgia Supreme Court's decision in his case was final for purposes of bestowing jurisdiction upon this Court. Appellant argues that his case falls within that opinion's third category of cases in which this Court will take jurisdiction of an appeal or a petition for certiorari notwithstanding the pendency of additional proceedings in the State court. Id. at 481.

It is apparent, however, from an examination of the Georgia Supreme Court's decision in Bell v. Hopper, 237 Ga. 189, 227 S.E.2d 41 (1976) that Appellant's case does not fit within any of the categories set forth in the Cox Broadcasting decision. The Georgia Supreme Court remanded the case for a second evidentiary hearing in the habeas corpus court, specifically on the questions of whether Appellant's sentence had been commuted or had otherwise expired, whether Appellant had been pardoned or paroled, and whether Appellant's current confinement was legal. Appendix A, p. A2. Clearly, the majority of the Georgia Supreme Court reserved judgment, pending the further development of the record, on Appellant's contention that he was denied due process by his arrest and imprisonment following his release.

In contrast, the cases relied upon by Appellant are those in which "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." Cox Broadcasting Corp. v. Cohn, supra, 420 U.S. at 481. Should Appellant not prevail on the merits of his contentions after a second evidentiary hearing in the habeas corpus court, there exists no barrier to his seeking review on these points in the Georgia Supreme Court. Should Appellant prevail, the issues would not be mooted and could be

raised on appeal by the Respondent under the Georgia habeas corpus statute. Ga. Code Ann. § 50-127 (11) (1976 Supp.). Cf. California v. Stewart, 384 U.S. 436 (1966).

The situation in Appellant's case is somewhat analogous to that found in Costarelli v. Massachusetts, 421 U.S. 193 (1975). Finding that there had been no adjudication of the case in the Supreme Judicial Court of Massachusetts, the Court rejected the contention that such review was inadequate, pointing out that the State provided a method for asserting the constitutional claim in the trial court and in preserving the claim for review in the highest court of Massachusetts. In response to the argument that the claim might become moot under the State's two-tier criminal trial system, the Court stated that this circumstance "does not mean that (Appellant) may draft his own rules of procedure in order to raise the claim only before those Massachusetts courts which he deems appropriate." Id. at 197. Sub judice, Appellant, apparently not desirous of further factual development on the circumstances of his release from the Georgia State Prison in September 1975, seeks to circumvent the Georgia Supreme Court's decision to remand his case for

further proceedings. Appellant has available a mechanism for review of any adverse judgment rendered in the Superior Court of Tattnall County, Georgia. Ga. Code Ann. § 50-127 (11) (a). This Court should therefore refuse to review the Georgia Supreme Court's decision on the ground that it is not a final judgment or decree within the meaning of 28 U.S.C. § 1257.

2. APPELLANT'S CHALLENGE TO THE CONSTITUTIONALITY OF GA. CODE § 6-1610 WAS NOT TIMELY.

Appellant first raised the issue of the allegedly unconstitutional application of Ga. Code § 6-1610 in his Motion for Rehearing in the Georgia Supreme Court. Appendix F. The Supreme Court denied Appellant's motion without opinion. Appendix D. Appellant's petition for habeas corpus and his appeal to the Georgia Supreme Court in no way raised any issue of the constitutionality of this statute, which provides for entry of the appellate court's decisions on the minutes of the court, and for the court's authority to give such direction to the lower court as may be appropriate. Ga. Code Ann. § 6-1610.

As this Court has held on numerous occasions, raising a federal question for the first time in a petition for rehearing addressed to the highest State court is insufficient unless the court actually entertained the petition and expressly decided the question. See Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945); Hansen v. Denckla, 357 U.S. 235 (1958); Herndon v. Georgia, 295 U.S. 441 (1935). The Georgia Supreme Court summarily denied Appellant's Motion for Rehearing without opinion, and Appellant cannot bring himself within any exception to the often-stated general rule. This Court should therefore dismiss Appellant's contentions concerning the allegedly unconstitutional application of this statute.

3. THIS COURT SHOULD DISMISS THE APPEAL BECAUSE APPELLANT HAS NOT EXHAUSTED HIS AVAILABLE STATE HABEAS CORPUS REMEDIES.

As an additional reason for dismissal, Appellee submits that adherence to the principle of exhaustion of State remedies codified in 28 U.S.C. § 2254 virtually mandates dismissal of this appeal. This Court has recently emphasized the continued strength and viability of the exhaustion doctrine. Pitchess v. Davis, 421 U.S. 482 (1975). See Picard v. Connor, 404 U.S. 270 (1971); Fay v. Noia, 372 U.S. 391, 419-20 (1963).

As previously discussed in connection with the lack of finality of the Georgia Supreme Court's decision, Appellant's habeas corpus case was remanded to the Superior Court of Tattnall County for further evidentiary proceedings. Should Appellant not prevail on the merits of his contentions, he has the remedy of a second appeal to the Georgia Supreme Court. Appellant thus has an available State remedy and has not been required to "file repetitious applications in the State courts." Humphrey v. Cady, 405 U.S. 504, 517, n. 18 (1972). See also Francisco v. Gathright, 419 U.S. 59 (1974).

Appellee submits that this Court's consideration of the merits of Appellant's contentions at this juncture in his habeas corpus proceedings would do violence to the doctrine and policy of the exhaustion requirement codified in 28 U.S.C § 2254.

CONCLUSION

For all of the above and foregoing reasons, this Court should dismiss the appeal.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Chief Deputy Attorney General

RICHARD L. CHAMBERS
Deputy Attorney General

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CERTIFICATE OF SERVICE

I, John C. Walden, one of the attorneys for the appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served the opposing party in this action with three copies of the foregoing Motion to Dismiss by depositing three copies of the same in the United States mail, with first class postage prepaid, addressed as follows:

Mr. Paul S. Weiner
Mr. Paul McGee
226 North McDonough Street
Post Office Box 698
Jonesboro, Georgia 30237

This 10th day of November, 1976.

JOHN C. WALDEN, Senior
Assistant Attorney General